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August 19, 2005

BRAC Commission

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Received

The Honorable Anthony J. Principi
Chairman
Defense Base Closure and Realignment Commission
2521 S. Clark Street, Suite 600
Arlington, VA 22202

Dear Chairman Principi:

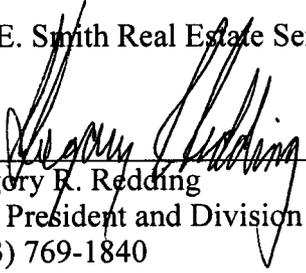
We are the largest single lessor impacted by DOD's recommendations to realign or close leased facilities in Northern Virginia. We have almost two million rentable square feet of office space leased to GSA and occupied by DOD components listed in DOD's recommendations. As you can imagine, we have carefully reviewed the Department's recommendations and we have already expressed our concerns to you and the Commission about the lack of a stated military mission rationale for the vast majority of these moves, the erroneous assumptions made regarding the inability of leased space to meet security standards, the gross-overestimation of leased space costs, and the gross underestimation of the cost of building new facilities on bases.

At this juncture, we want to address specifically certain fundamental legal issues that have been raised with respect to the consideration of leased space generally. At the conclusion of the Commission hearing on August 10th, you stated that the Commission, pursuant to Section 2910 of the BRAC law, has jurisdiction over leased space. We agree completely with your position and would not suggest that anyone challenge the Commission's jurisdiction or authority on that point. However, we do believe that the Department of Defense's decision to single out leased space in the National Capital Region for elimination is a violation of the law requiring that all bases be considered equally, as was the Department's failure to comply with the statutory requirement to use only certified data for its deliberations. For those reasons, we believe that the Department substantially deviated from the statutory criteria and requirements, and that the Commission should use its jurisdiction over leased space to reject those Department of Defense recommendations. We are certain that, if the Commission found clear evidence that a military service had singled out a particular class of bases for closure before even beginning its analyses and also failed to use certified data, the Commission would not allow that recommendation to stand. We only ask for comparable treatment here.

I have enclosed a short memorandum that elaborates on these points and ask that it be considered.

Sincerely,

Charles E. Smith Real Estate Services L.P.

By: 
Gregory R. Redding
Vice President and Division Counsel
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Enclosure

cc: David Hague, Esq., General Counsel

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Analysis of the Legal Issues Surrounding DOD's Plan to Eliminate Certain Leased Space Through the BRAC Process

Preliminary Statement

The base closure law and process, and the jurisdiction of the Base Realignment and Closure Commission, clearly extends to leased space under the jurisdiction of the Department of Defense. However, DOD's decision to use the authority under the BRAC statute to achieve its objective of eliminating leased space raises serious substantive and process issues. As a substantive matter, the elimination of leased space is not included in any of the criteria specifically enumerated in the statute as the intended bases for the realignment or closure of installations. The BRAC statute, therefore, does not provide DOD the authority to take the action it seeks. From the process standpoint, DOD's proposed action is inconsistent with or fails to comply with the statute, and, in that regard, compromises the BRAC process. Finally, DOD's misuse of the BRAC process when other more directly relevant options exist unnecessarily burdens the BRAC process and, in some instances, would allow DOD to improperly circumvent other comprehensive and thoughtful processes.

Argument

1. The criteria established by the BRAC statute do not support DOD's plan to eliminate leased space.

The Defense Department is required by law to only use the enumerated BRAC criteria in the development of its base realignment and closure recommendations. The statutory BRAC criteria provide no support for the Department's plan to provide for wholesale elimination of leased space in the National Capital Region (NCR) as a starting point in the process. It would be an entirely different posture if DOD had studied each situation individually, using certified data, and arrived at an independent judgment as to the military value of each leased space location.

The Defense Base Closure and Realignment Act of 1990 (Base Closure Act), P.L. 101-510, 104 Stat. 1485, as amended by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, P.L. 108-375, 118 Stat. 1811, authorizes the current BRAC round and directs the Secretary of Defense to use four primary selection criteria related to military value in making recommendations for base realignments and closures:

- (1) The current and future mission capabilities and the impact on operational readiness of the total force of the DOD, including the impact on joint warfighting, training, and readiness.
- (2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.

- (3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.
- (4) The cost of operations and manpower implications.

Base Closure Act § 2913(b).

The Base Closure Act also authorizes the Secretary of Defense to utilize the following secondary criteria with respect to the development of BRAC recommendations:

- (1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed costs.
- (2) The economic impact on existing communities in the vicinity of military installations.
- (3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.
- (4) The environmental impact, including the impact of costs related to potential environmental restorations, waste management, and environmental compliance activities.

Base Closure Act § 2913(c).

These eight criteria were intended by Congress to provide the exclusive framework for the Defense Department's BRAC analysis. Section 2913(f) of the Base Closure Act is explicit on this point:

The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

Realignment or closure of leased space facilities based solely on DOD's stated objective to eliminate leased space, as opposed to undertaking independent analyses in each case, is inconsistent with the authority provided under BRAC. Elimination of leased space is not included among the eight BRAC criteria.¹ Use of this as a determinative factor by DOD, as opposed to arriving at it as an outcome from the same careful, quantitative analysis performed for all of the ordinary military installations, therefore amounts to a substantial deviation from the BRAC criteria.

¹ Furthermore, DOD's plan for the elimination of leased space, as an end in itself, is not supported by DOD's own BRAC principles, as provided in Memorandum from Undersecretary of Defense for Acquisition, Technology and Logistics Michael W. Wynne, for Secretaries of the Military Departments and Chairmen of Joint Cross Service Groups, 2005 Base Closure and Realignment Selection Criteria (January 4, 2005).

2. DOD's process for developing leased spaced recommendations compromises the overall BRAC process.

A. DOD's misapplication of the required military value analysis is inconsistent with the BRAC statute.

Without an explicit lawful basis, DOD disregarded the military value analysis required by the BRAC law in favor of the elimination of leased space. In doing so, the Department considered factors not authorized by the BRAC statute, and therefore developed recommendations on leased space that "substantially deviate" from the BRAC legislative requirements.

Despite the explicit criteria provided by the BRAC statute, the Defense Department in 2004 began to utilize impermissible factors in the development of its BRAC recommendations. On September 4, 2004, Acting Undersecretary of Defense Michael Wynne, who was responsible for managing the internal BRAC process in the Department, proposed that a series of 77 transformation options would "constitute a minimal analytical framework upon which the Military Departments and Joint Cross Service Groups will conduct their respective BRAC analyses." Although there is no clear evidence that the Department ever formally adopted these transformational options, the record shows that the military departments and Joint Cross Service groups in the development of the BRAC recommendations used these options extensively.

More specifically, two OSD transformational imperatives appear throughout the day-to-day minutes of the DOD BRAC deliberations. As identified in the internal minutes of the Headquarters and Support Activities (H&SA) Joint Cross Service Group, these imperatives included "(1) significant reduction of leased space in the NCR, and (2) reduce DOD presence in the NCR in terms of activities and employees." The goal to vacate leased office space was the guiding principle for many of the DOD recommendations these transformational options – a principle that has no rational relationship to military value, cost savings or any of the statutory criteria provided by the BRAC statute. The minutes clearly show that time and again, military value analysis was disregarded in favor of the reduction of leased space in the National Capital Region.

Consistency with the BRAC criteria and principles requires an objective military value analysis without regard to the unauthorized and arbitrary factor of the elimination of leased space. Consideration of these transformational options therefore constitutes an impermissible, and therefore illegal, consideration in DOD's development of the BRAC recommendations.

B. DOD's unequal treatment of leased facilities fails to comply with the BRAC statute.

The Base Closure Act requires that all installations must be treated equally. Section 2903(c)(3)(A) of the Base Closure Act provides as follows:

In considering military installations for closure or realignment, the Secretary shall consider all military installations inside the United States equally without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department.

This provision prevents one installation or class of installations from being considered unequally, even those that have been previously considered a proposed for closure or realignment.

DOD has adopted an objective to eliminate all leased space. DOD's categorical assumption that all leased space is undesirable violates section 2903(c)(3)(A) of the BRAC statute. DOD's blanket designation of all leased space as inferior would be akin to using a criterion that all military installations in the Northeast United States must be vacated. Such a categorical assumption cannot stand.

C. DOD recommendations on leased space are not based on certified data that is accurate and complete, and therefore fail to comply with the BRAC statute.

Section 2903(c)(5)(A) of the Base Closure Act, requires that information submitted to the Secretary of Defense or the Commission concerning the closure or realignment of a military installation must be certified as accurate and complete. This requirement was imposed by Congress in the Defense Authorization Act for Fiscal Years 1992 and 1993, following BRAC decisions involving cost data that was, according to Senator William Cohen, "manipulated and shaded in a way to achieve a preconceived decision." 102 Cong. Rec. S4679 (Daily ed. Aug. 1, 1991) (statement of Sen. Cohen). Senator Cohen expressed his frustration over the Air Force's failure to provide cost explanations until the day after the BRAC recommendations were finalized. Senator Cohen included the requirement in order to ensure a "much clearer, fairer, and more careful explanation of what the Defense Department is recommending." *Id.* The BRAC statute now provides a process for identifying and explaining discrepancies in submitted cost data. See Senate Report No. 102-113, at 232 (July 19, 1991). The data certification requirement is therefore important in ensuring the overall integrity of the BRAC process.

In the current BRAC round, DOD failed to use certified data in several areas with respect to its recommendations impacting leased space. First, DOD clearly did not use certified data with respect to its estimates of lease costs. Rather than spend the necessary resources to gather actual lease costs, DOD instead used market survey data to estimate savings. This failure by DOD is confirmed by the Memorandum of Carla K Coulson, Deputy Director, Headquarters and Support Activities JCSG to OSD BRAC Clearinghouse, OSD BRAC Clearinghouse Tasker 0664 – Leased Facilities in the NCR Interim Response (July 28, 2005), which states, "the HAS JCSG did not gather information via BRAC certified data gathering processes regarding the cost of leased space in FY 2004 dollars and lease termination dates, and, as such, that information is not provided... The matching of buildings and leases with BRAC recommendations is complex and potentially quite time consuming." DOD's failure to gather accurate, certified data provides an inaccurate measure of lease cost and savings.

Second, DOD assumed, without investigation of the circumstances at particular facilities, that leased space did not and could not meet the Department's force protection standards. This assumption biased the process against leased space without any analysis of the force protection capabilities at a particular facility. An easy solution for the Department to obtain this information would have been to ask property landlords for data on force protection capabilities, making such data subject to non-disclosure agreements. The Department did not make such requests.

D. Realignment or closure of leased facilities in the National Capital Region does not require authority under the Base Closure Act because they are not "military installations" under the jurisdiction of the Department of Defense.

The authority of the Base Closure Act is required only where the Department of Defense closes a military installation at which at least 300 civilian personnel are authorized to be employed, or realigns a military installation involving a reduction by more than 1,000, or by more than 50 percent, in the

number of civilian personnel authorized to be employed at that installation. 10 U.S.C. § 2687(a)(1), (2).

“Military installation” is defined by statute as “a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility...” 10 U.S.C. § 2687(e)(1); Defense Closure Act § 2910(4) [Emphasis added]. This statutory definition of military installation includes an important limiting phrase, “under the jurisdiction of the Department of Defense.”

Contracts for DOD leased space in the National Capital Region are administered by, and therefore are under the jurisdiction of the General Services Administration (GSA), and not DOD.² GSA has the responsibility for managing these facilities, and routinely co-locates a variety of government tenants, including both DOD and non-DOD agencies. In addition, GSA is obligated to pay the lease costs for the full term of the lease, regardless of DOD’s status as a tenant.

To illustrate this point consider this situation. The 177th Fighter Wing of the New Jersey Air National Guard is located at Atlantic City International Airport, where it is co-located with the U.S. Coast Guard (USCG) Air Station Atlantic City. While the Department could disestablish or realign the 177th, DOD could not close the facility housing the USCG Air Station because the Coast Guard station is not “under the jurisdiction of DOD.”

Similarly, DOD-utilized leased space in the National Capital Region falls under the jurisdiction of GSA. Unilateral pullouts by DOD from GSA-leased facilities significantly impacts GSA’s management of those properties. Because they are not under the jurisdiction of DOD, realignments impacting GSA-leased space need not be handled through the BRAC process. In fact, is preferable that such issues impacting leased space in the National Capital Region be handled outside of the time and resource-intensive BRAC process.

3. DOD is misusing the BRAC process where other more appropriate options exist for addressing leased space issues.

A. The Department’s effort to include elimination of leased space as a goal in itself is a misuse of the BRAC process, which improperly circumvents an ongoing, comprehensive transition to new security standards for leased facilities.

The Department is using the BRAC process to impose new security standards in contravention of its own regulations. DOD Instruction 4165.70 ¶ 6.6 (April 6, 2005) provides that “all facilities shall attempt to meet the DOD antiterrorism standards in DOD Instruction 2000.16.” In addition, ¶ 6.6.1 of the Instruction provides that “relocation for leaseholds or otherwise should only be to

² It is important to note that in connection to the 1990 BRAC round, the Defense Logistics Agency argued that a defense agency in leased space is not a “military installation” under the statute. Congress responded to DLA’s position in the National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, 104 Stat. 1485, by amending the BRAC statute to include in the definition of “military installation,” activities “under the jurisdiction of the Department of Defense, including any leased facility.” This paper does not argue for such a broad exemption for leased facilities as was argued by DLA. Rather, this paper simply points out that leasehold properties administered by the GSA are not “under the jurisdiction of the Department of Defense.” As a result, only those leased facilities under the jurisdiction of GSA – largely located in the National Capital Region – would not be subject to the BRAC statute under the definition of “military installation.”

facilities, whether owned or leased, that meet the [antiterrorism] standards. Finally, ¶ 6.6.2 provides that, “antiterrorism standards shall be a key consideration when evaluating the suitability of a facility.”

DOD regulations provide a specified timetable for when leased facilities must fully comply with the new security requirements. Unified Facilities Criteria (UFC) 4-010-01 ¶ 1-6.4 (October 8, 2003) provides for implementation of the security requirements as follows:

DOD personnel occupying leased buildings deserve the same level of protection as those in DOD-owned buildings. Implementation of these standards is therefore mandatory for all facilities leased for DOD use and for those buildings in which DOD receives a space assignment from another government agency except as established below. This requirement is intended to cover all situations, including General Services Administration space, privatized buildings, and host-nation and other foreign government buildings. This requirement is applicable for all new leases executed after 1 October 2005 and to renewal or extension of any existing lease on or after 1 October 2009. Leases executed prior to the above fiscal years will comply with these standards where possible.

Therefore, renewal or extension of existing leases must comply with the new security requirements by October 1, 2009. DOD’s decision to vacate leased space through the BRAC process contravenes DOD’s own regulations.

DOD’s imposition of force protection standards through the BRAC process appears intended to meet the goal of eliminating leased space, rather than following a thoughtful, collaborative and cost-effective process for implementing needed force protection standards.

B. The Department did not need the BRAC process to address leased space issues when other more directly relevant options exist.

i) DOD has the authority to move from leased space at any time.

Leased space by definition is only temporary. DOD Instruction 4165.70 ¶ 6.7.1 (August 6, 2006), provides as follows:

When possible, each DOD component shall take prompt action to relocate activities accommodated in leased building space into government-owned facilities, preferably located in a military installation, and to dispose of excess leaseholds.

This instruction permits DOD to move from leased space at any time. Therefore, moving out of leased space is not a closure, and proposals to move out of leased space need not be included in the BRAC process. DOD’s BRAC recommendations set an unwise precedent that the Department can only move from leased space through the BRAC process.

The Department acted appropriately earlier this year when it determined that two realignments impacting leased space – namely the United States Southern Command in Miami, Florida, and the Headquarters, Joint Forces Command in Suffolk, Virginia – were more appropriately handled outside of the BRAC process. Consistent with those activities, the Defense Department should similarly handle the lease and force

protection issues in the National Capital Region outside of the BRAC process. The process required by the Base Closure Act is not necessary to implement changes involving leased facilities in the NCR. In fact, the complexity of the leased space issues would be more effectively handled through ordinary DOD mechanisms, and outside of the BRAC procedures.

ii) Lease renewals are not subject to special scrutiny by DOD leadership.

With respect to real property acquisition, DOD Instruction 4165.71 ¶ 6.1 (January 6, 2005) provides that the Undersecretary of Defense for Acquisition, Technology and Logistics must approve leases with annual lease prices that exceed \$1M. This instruction also provides that any such acquisition within the Washington, D.C. area (defined as within 100 miles of the Pentagon) must be approved by Secretary of Defense or Deputy Secretary of Defense. *Id.* ¶ 6.1.1.

However, the instruction provides that “renewals of real property agreements such as existing leases, withdrawals, permits or other use agreements (other than those at bases being closed or realigned) are not subject to the requirements of this paragraph 6.1.” *Id.* ¶ 6.1.3. Therefore, lease renewals are not subject to special scrutiny.

Conclusion

DOD’s plan to eliminate leased space through the BRAC process fails to comply with the BRAC statute in several ways. The Department’s use of a factor that is not among the eight statutory criteria constitutes a substantial and unauthorized deviation from the BRAC statute. DOD’s misapplication of the required military value analysis for leased facilities, its failure to treat all facilities equally, and its failure to use certified, accurate data are all additional substantial failures to comply with the BRAC statute. Further, leased space in the National Capital Region is properly “under the jurisdiction” of the General Services Administration, and not DOD, and thus should not be included in the BRAC process. The Department has independent and more directly relevant authority to address issues presented by leased space. Finally, DOD is not required to use the authority of the BRAC statute to address leased space issues in the National Capital Region and should not be permitted to unnecessarily burden the BRAC process or to circumvent other more appropriate alternatives.